

19 June 1985

NEW ZEALAND - IMPORTS OF ELECTRICAL TRANSFORMERS FROM FINLAND

*Report by the Panel adopted on 18 July 1985
(L/5814 - 32S/55)*

I. Introduction

1.1 In a communication dated 21 September 1984, which was circulated to contracting parties in document L/5682, the Government of Finland requested the CONTRACTING PARTIES to establish a panel to examine a dispute between Finland and New Zealand concerning anti-dumping proceedings against electric transformers delivered by a Finnish company to a local electrical power board in New Zealand. The communication indicated that the two parties had engaged in consultations under Article XXIII:1 which had not led to a satisfactory solution.

1.2 At its meeting of 2 October 1984 the Council agreed to establish a panel and authorized its Chairman, in consultation with the Parties concerned, to decide on appropriate terms of reference and to designate the Chairman and the members of the Panel (C/M/181).

1.3 At the meeting of the Council on 6-8 November 1984 (C/M/183), the Chairman of the Council informed the Council that, following consultations with the Parties concerned, the composition and terms of the Panel had been agreed as follows:

Composition:

Chairman: Mr. H. van Tuinen
Members: Mr. J. Kaczurba
Mr. A. Stoler

Terms of reference

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by Finland relating to the imposition of anti-dumping duties by New Zealand on electrical transformers from Finland, and to make such findings, including findings on the question of nullification or impairment, as will assist the CONTRACTING PARTIES in making recommendations and rulings, as provided for in Article XXIII".

1.4 The Panel met twice with the two parties on 17 December 1984 and 6 March 1985. In addition, the Panel met on 27, 29 March, 10 and 13 May 1985.

II. Factual aspects

2.1 The anti-dumping case against the Finnish exporter arose out of a call for tenders by an electric power board in New Zealand for the supply of two transformers, i.e. a 4.5 MVA* unit and a 12.5 MVA unit. The tender prices of the Finnish exporter for the power transformers were:

4.5	MVA	-	\$NZ	41,643	C&F	NZ	Port
12.5	MVA	-	\$NZ	133,144	C&F	NZ	Port

The tenders closed on 29 January 1982 and the contract for supply of the two transformers was awarded to the Finnish company.

*MVA (megavolt ampere) is the unit of measurement internationally accepted for indicating the size of transformers.

2.2 Following the award of the contract, a New Zealand company which had also tendered for the contract, requested that the New Zealand Customs Department (Customs) initiate dumping proceedings against the Finnish exporter. Anti-dumping proceedings were initiated on 17 March 1982 but were subsequently interrupted following a decision taken on 6 April 1982 by the New Zealand Department of Trade and Industry not to grant an import licence for the two Finnish transformers. The effect of this decision was to inhibit the entry into New Zealand of the two Finnish transformers. The dumping proceeding was therefore terminated.

2.3 Subsequent representations were made to the Government by the New Zealand agent of the Finnish exporter, which led to the reversal of the earlier decision not to issue an import licence. Thereafter, on 30 June 1982 the New Zealand authorities were requested by the New Zealand complaining firm to reinstate dumping proceedings. The anti-dumping investigation was re-opened on the same day.

2.4 The two transformers were shipped to New Zealand and were entered for home consumption on 10 February 1983. In addition to the normal customs duty, a provisional dumping duty of \$NZ 18,560 was assessed on the importer following a decision of the Minister of Customs that, on the basis of the information available to him at that time, a prima facie case of dumping existed. This provisional duty was refunded to the importer on 19 September 1983. In February 1984 the New Zealand Minister of Customs made the finding that the two transformers in question were imported at less than their normal value and that their importation had caused material injury to the transformer manufacturing industry in New Zealand. Subsequently the Minister imposed an anti-dumping duty equal to the full alleged dumping margin. The decision was retroactive to July 1982. The final duty (totalling \$NZ 49,543) was paid by the importer on 17 July 1984.

2.5 The amount of the final anti-dumping duty resulted from a difference between the export price and the constructed normal value. The price difference in terms of ex factory prices in respect of the 12.5 MVA transformer was \$NZ 38,595 (\$NZ 154,775 normal value less \$NZ 116,180 tender price), and in respect of the 4.5 MVA transformer was \$NZ 13,107 (\$NZ 49,075 normal value less \$NZ 35,968 tender price). The actual anti-dumping duties levied were \$NZ 37,720 in respect of the 12.5 MVA transformer and \$NZ 11,823 in respect of the 4.5 MVA transformer, i.e. a total of \$NZ 49,543.

2.6 According to data supplied by New Zealand, the New Zealand power transformer market in 1980/81, 1981/82 and 1982/83 (Total MVA Rating) was as follows:

Year ended 31 March	Total output, NZ industry, by MVA rating	of which, complaining NZ company accounted for, %	Imports by MVA rating	Total NZ outputs plus imports, MVA rating	of which, complaining NZ company accounted for, %
	(1)	(2)	(3)	(4)	(5)
80/81	290	91.7	200	490	54.3
81/82	310	90.0	200	510	54.7
82/83	430	92.1	700	1130	35.0

2.7 According to the MVA rating the two Finnish transformers together equalled 17 MVA. Total sales by value of domestic producers amounted to \$NZ 5,524,000 in 1980/81, \$NZ 4,934,000 in 1981/82 and \$NZ 5,920,000 in 1982/83. Thus, in terms of total sales for the 1982-83 year, the imported transformers represented 2.4 per cent (data submitted by New Zealand).

III. Main arguments

A. Dumping

3.1 The delegation of Finland denied that the Finnish exporter had engaged in dumping. The information supplied by the exporter clearly indicated that the price of the transformers was quite adequate to cover production costs, overheads and profits, i.e. that the transformers were not sold at dumped prices. The Finnish exporter had fully co-operated, to the extent possible, in the investigation. The fact that it had not been in a position to provide all the information requested did not entitle the investigating authorities to base their dumping finding on hypothetical calculations, in particular when they were aware of the exporter's problems in supplying the information in the required format. Finland therefore asked the Panel to determine that New Zealand was not permitted, under GATT practice, to base its findings on hypothetical calculations.

3.2 In developing its argument, Finland recognized that the investigated company was obliged to co-operate and to provide the information it had available, if the time and effort involved were not unreasonable. However, in case the investigated company did not itself possess the requested information, or if it could not be retraced or processed to the requested format without undue time and effort, the investigators should work on the basis of the information provided, unless they had very specific reasons to doubt its reliability. In the present case the investigators had asked the Finnish exporter to provide information which it did not have available. The information which was provided had been considered insufficient and unreliable by the investigating authorities. In particular, the latter had considered computer sheets of the cost calculations to be insufficient and had insisted on obtaining invoices and purchase receipts for input materials specifically purchased for the production of the two transformers. Explanations concerning the 12.5 MVA transformer had been disregarded, as well as the assurance that the requested data concerning the 4.5 MVA transformer were not available. The investigating authorities were fully aware that the accounting and reporting system of the Spanish exporter was such that it could not provide purchase receipts for input materials for these particular transformers. The latter, although being "tailor-made" products, were made from standard material. Therefore no individual purchase invoices for components for these transformers existed, because the input materials had been bought in bulk; the prices were then programmed into the computer to reflect the market value applicable.

3.3 The delegation of Finland further explained that the purchase prices of input materials could not be directly related to the cost calculations of the same inputs for the purpose of establishing normal value. Naturally these purchase prices could be documented. However, for the purpose of cost calculations the company had made certain adjustments to the purchase prices of inputs so that these inputs were priced at replacement cost level. That meant that no direct link could be established between the documented purchase prices of inputs and their estimated cost in the computerized price calculation. Nevertheless, the investigating authorities had insisted that the Finnish exporter provide the impossible, at the penalty of New Zealand otherwise basing its findings on other information. Established GATT practice permitted taking anti-dumping measures on the basis of other information available only in case of obstruction of the investigation, but not in case of incapacity to provide all requested information.

3.4 Finland further considered that the doubts regarding input costs for the transformers seemed to have been based on published world market prices of various raw materials. However, this did not exclude the possibility that the Finnish exporter had obtained more favourable prices. Therefore, the mere suspicion regarding the price level of the inputs for the transformers did not constitute a sufficient basis for applying anti-dumping measures.

3.5 The New Zealand delegate said that since both transformers were custom designed and manufactured, it had not been possible to compare the selling price of the units sold to New Zealand with units sold by the exporter on its home market or to third countries. The investigating authority had, therefore, to use the alternative method provided for in Article VI:1 of the GATT, namely to establish the cost of production. An investigation based on cost of production usually involved an examination and verification of data relating to input components and pricing, costings, technical details, contractual specifications as well as evidence of selling and administrative expenses, overhead and profit. The New Zealand authorities had sought this information from the Finnish company to enable it to make a correct determination on the question of dumping. However, the Customs had encountered considerable difficulty in securing this information from the Finnish exporter. Only minimal information had been provided in respect of the 12.5 MVA transformer and even less for the 4.5 MVA transformer, and this over a prolonged period of eighteen months. The New Zealand authorities had therefore been forced to construct normal value for both transformers, in addition to the sparse information provided by the Finnish company, on the basis of information obtained elsewhere.

3.6 Referring to the Finnish argument concerning availability of information, New Zealand considered that this implied that a firm can frustrate an enquiry by simply stating that a breakdown of total costs would involve it in undue time and effort. In the present investigation this was precisely the position in respect of the 4.5 MVA transformer because only lump sum totals for material and labour had been provided. These figures could not be accepted without further investigation. The same applied, though to a lesser degree, for the 12.5 MVA transformer for which many of the components and materials had not been priced.

3.7 The New Zealand view was that all the information submitted by the Finnish company had been examined in detail and had formed the basis for the constructed value of both transformers, but obviously some reference to manufacturers and suppliers had been necessary in assessing realistic values for the unpriced items. The reluctance of the Finnish exporter to supply even an approximate breakdown of certain costs was, in New Zealand's view, due to the fact that such information would highlight costing deficiencies. To say that the exporter did not have price details for materials and components purchased was unacceptable. Otherwise the company would not know what to pay its suppliers. In addition, details of the components of the transformers, including the costs, have been established at the design stage and unit rates available from the computer. These figures had to be available irrespective of whether the company ledgers were computerized or not. In addition, details of the components, including the costs, must have been established at the design stage.

3.8 New Zealand rejected the argument put forward by the Finnish delegation that the calculations made by its investigating authorities had been hypothetical. The constructed costs for material, labour, overhead and profit were based on the information supplied by the Finnish exporter or were constructed on the basis of known material costs, e.g. prices on the London Metal Exchange for copper, which were established from an analysis of the technical data submitted with the tender, factory test reports together with inspection and measurement of the unit on site in New Zealand.

B. Injury and threat thereof

(i) Legal aspects

3.9 New Zealand's position was that the imposition of anti-dumping duties, on the importation of two Finnish transformers was justified in terms of New Zealand's rights and obligations under the GATT, viz under Article VI of the GATT. As New Zealand was not a party to the Agreement on Implementation of Article VI of the GATT (Anti-Dumping Code) any interpretations or obligations derived from either the rules of the Code or from practice under the Code did not apply to New Zealand. According to Article VI:6(a) of the GATT "no contracting party shall levy any anti-dumping ... duty

on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping ... is such as to cause or threaten material injury to an established domestic industry ...". This constituted a clear obligation for a contracting party to reach a determination that material injury had been caused or threatened before levying anti-dumping duty. The correlative and equally clear right of a contracting party was, all other conditions being satisfied, that it might levy an anti-dumping duty where it determined that material injury had been caused or threatened. "Material injury" was therefore a matter specifically and expressly reserved under the terms of Article VI:6(a) for the determination of the contracting party levying the anti-dumping duty. Other contracting parties might enquire, under GATT, as to whether a contracting party did, as a matter of fact, make a determination but they might not enquire into the nature of the determination itself. On a matter of such importance, safeguarding the competence of national authorities, the clear words of the Article did not permit any other party or body to make the determination formally required by this Article or to review its basis. That was a matter falling exclusively within the competence of national authorities. To allow otherwise would be to depart from the express terms of the Article. The making of such a determination by a contracting party was therefore sufficient to discharge the obligation imposed by Article VI:6(a) or, conversely, to confer the right to levy anti-dumping in accordance with the provisions of Article VI:2.

3.10 Referring to the question of what might be examined under the GATT in terms of Article VI, New Zealand agrees that no anti-dumping duties should be levied unless certain facts had been established. A contracting party had to show that it had exercised its rights consistently with the provisions of Article VI. But these facts were those relating (i) to the determination of price difference in accordance with Article VI:1 and (ii) to whether or not the importing contracting party had made a determination that material injury had been caused or threatened. It was therefore open to contracting parties to scrutinize the manner in which a price determination was reached since this matter was stated as an objective rule in Article VI:2 and Article VI:1, but not the manner in which a finding on injury was arrived at. An importing contracting party was required to exercise its rights consistently with these rules as defined. In imposing anti-dumping duties on the importation of the two Finnish transformers, New Zealand had complied with all of the applicable GATT provisions.

3.11 Finland disagreed with New Zealand's interpretation that the words "... it determines ..." in paragraph 6(a) of Article VI of GATT gave an importing country full discretion regarding the injury determination. Such an interpretation would nullify GATT practice and discipline concerning injury criteria. It would open the door to anarchy without the possibility of international surveillance. One main purpose of GATT, i.e. to impose internationally agreed rules and discipline in international trade matters, would be nullified as far as an important aspect of anti-dumping practices was concerned. The words "it determines" could not be given more than an operative meaning, i.e. indicating who was competent to make the injury determination, but under no circumstances could the words be interpreted to liberate the contracting party in question from observing international rules, discipline and established practice.

(ii) Market developments and economic situation

3.12 New Zealand stated that the complaining company was the dominant manufacturer of both distribution and power transformers in New Zealand representing 92 per cent of total domestic production in 1983. It therefore had to be considered as representative of the New Zealand industry. There existed another firm whose activities in the manufacture of transformers were limited to units up to 5 MVA. As a consequence, material injury (or threat thereof) to the complaining company constituted material injury (or threat thereof) to the New Zealand industry in terms of Article VI of the GATT.

3.13 The New Zealand delegation stated that the imports concerned were landed at a time when the complaining firm was facing a sharp and sustained downturn in new orders and orders on hand in the market segments of 1-10 and 10-20 MVA identified below. In that connection it had to be, noted that the transformer industry in New Zealand was structured in such a way that there existed four distinguishable ranges of transformers. This market segmentation reflected significant differences in the design, manufacturing technique and marketing, according to the MVA rating. The different ranges were transformers from 1-5 MVA, 5-10 MVA, 10-20 MVA, and 20 MVA and above. It was recognized, however, that this segmentation did not necessarily coincide with that in other countries. The market segments affected by the imports were particularly vulnerable to the loss of sales involved. In terms of total sales for the 1982-83 year the imported transformers represented 2.4 per cent. In the 1-5 MVA segment the 4.5 MVA import represented 18 per cent of sales in that segment, while the 12.5 MVA transformer constituted 11.5 per cent of sales in the 10-20 MVA segment. These market segments were also particularly lacking in new orders. This not only constituted material injury in terms of sales foregone, but also had an effect on profitability. Given the small size of the New Zealand industry and the developments in the market-place (particularly the large increase in imports), the complaining company had been faced with declining profitability. At the same time, it suffered considerable uncertainty as to future orders. With declining profitability, the loss (calculated at \$NZ 56,100) it had sustained as a result of these imports constituted a very significant proportion of its net tax paid profit from which, among other things, it would be necessary for the company to finance future investment. Further evidence of the precarious financial situation in which the complaining company found itself could be seen in the ratio of total assets to liabilities which stood at 1:1 in 1982-83. Of greater significance in the short term, its ratio of liquid assets to current liabilities was dangerously low at 0.6:1 during 1982-83. As such, the company faced a situation whereby it could not meet its current liabilities in the short term. The lost contract, and resultant profits foregone, exacerbated this situation, which was grave enough to result in creditors having to wait up to 120 days (in some cases longer) to receive monies owing to them. The direct impact the company faced as a result of these factors was that their ability to generate sufficient funds (from profits) or raise capital by borrowing for future investment was impaired. In this way, the imports concerned materially injured the domestic manufacturer.

3.14 New Zealand further considered that there was threat of material injury to the industry. The power transformer industry in New Zealand was characterized by a high level of capital investment. There was, therefore, a need to maintain a high and consistent level of production so that costs could be recovered, provision made for future investment in plant and equipment and a satisfactory profit yield achieved. In the year in which the imports occurred, the New Zealand firm faced a 250 per cent increase in imports and a decline in market share. In that context, the company had been obliged to reduce its price levels to compete with offshore competition. At the same time, it was aware of the decline in new orders and those on hand. Taken together, these constituted factors contributing to considerable commercial uncertainty.

3.15 Furthermore, in that situation of reduced net tax paid profit, declining new orders and reduced retained earnings, importation of the transformers priced at less than normal value occurred, compounding thereby the situation of commercial uncertainty at a particularly difficult time for the company. In any industry, it was vital that decisions on future production and investment could be made in confidence that a climate of fair trading practices would prevail. Where a company or industry was sufficiently large, strong, diverse and profitable, its expectations for the future were unlikely to be affected by goods imported at less than normal value. However, in this case - where the industry had been at a critically low level of profitability and at the limit of its capacity to adjust - the precedential implications were of heightened seriousness. The possibility of any further such importations would be that the complaining company would be obliged to suppress still further its tender prices. This would entail reducing future profit margins, thus exacerbating the deteriorating profitability of the New Zealand industry. Given that the company was operating at the minimum viable level, such suppression could

not have been sustained. The importation concerned, therefore, threatened to undermine the confidence of the industry to tender at prices which would have ensured continued company viability. There would have been no confidence that such a situation would not recur, and the company was therefore facing a threat of material injury.

3.16 Finland objected to the proposed differentiation of the New Zealand industry into four separate ranges of transformers as not acceptable under GATT rules. Not only did the New Zealand industry as a whole, but also the complaining company produce the full range of transformers from 10 kvA to 150 MVA. Accepting the New Zealand argument would imply the possibility of granting import relief to individual production plants or even individual production lines which could under no circumstances constitute "domestic industry" under GATT rules.

3.17 Referring to the economic position of the New Zealand producers, Finland pointed out that according to data submitted by New Zealand, the complaining firm was increasing its sales at the same time when, allegedly, it was suffering losses. It was normal commercial practice to accept sales at a loss in order to maintain sales volume, but increasing sales at a loss, as the New Zealand firm seemed to have carried out, was difficult to understand. As regards the impact of the imports on the firm's profitability, there was no guarantee that it would have received the order at the tender price of \$NZ 320,285. There were other competitors for the smaller transformer and the firm may well have had to adjust its price. Therefore, the net tax paid profit of \$NZ 56,100 from this contract was a purely hypothetical figure. A company's profit and loss figures in the published accounts were influenced by several factors, not least the company's own policy regarding depreciations and stock valuation. Therefore it was not acceptable to imply that the imports in question were the reason for any possible profit loss. In the Finnish view there was nothing to support the statement that the position of domestic producers was particularly vulnerable and precarious.

3.18 Finland further considered that even assuming that domestic producers were in a difficult situation at the time the contract was awarded and the transformers were delivered, the figures showed that the impact of the Finnish sale had been insignificant. The total capacity of the two transformers was 17 MVA. In terms of MVA rating, this order represented 2.4 per cent of total imports and 1.5 per cent of total imports plus domestic production in 1982/83. The value of the contract was about \$NZ 200,000 which represented 4 per cent of the complaining firm's average sales in 1982/83 and 3.6 per cent of total sales of all domestic producers. The import contract represented 4.7 per cent of the firm's average quarterly orders on hand in 1982/83 and 4.2 per cent of average orders on hand in 1983. Those figures clearly indicated the minimal impact of the imports in question. The view taken by New Zealand that any given amount of profit lost constitutes in some sense an injury to a domestic industry was not in conformity with GATT rules and established practice regarding injury, which must be "material". "Any amount of profit lost" also covered minimal injury and did not as such justify anti-dumping measures. Furthermore, there was an established GATT practice as to the criteria when assessing injury. The imports in question and their significance did not reach any threshold considered reasonable and adequate under Gatt rules and practice.

3.19 As to the question of threat of injury, Finland said that the import contract had been an isolated event which had not been repeated. When the anti-dumping complaint had been lodged in March 1982, there might have been uncertainty about future plans of the Finnish exporter as regards the New Zealand market. However, when the decision had been taken in February 1984 to impose anti-dumping duties, it was obvious that there would be no further deliveries. Even at the time when the complaint had been lodged the possibility that the Finnish exporter might make further offers was remote and hypothetical, whereas GATT rules required that threat of material injury justifies action only if it is clearly foreseen and imminent. In making decisions regarding appropriate action on the complaint, the situation should have been assessed on the basis of facts known when the decision was taken and not when the complaint was made.

IV. Conclusions

4.1 The Panel based its consideration of the case before it on Article VI of the General Agreement, in particular its paragraphs 1, 2 and 6(a). It noted that paragraph 1 of Article VI defined dumping as the introduction of products of one country into the commerce of another country at less than their normal value, but condemned dumping as such only in case material injury had been caused. In this connection, Article VI:6(a) prohibited the levying of an anti-dumping duty by a contracting party on the importation of any product of another contracting party unless it determined that the effect of the dumping was such as to cause or threaten material injury to an established domestic industry.

4.2 The first question which the Panel addressed was whether the Finnish exporter, in its sale of the two transformers in question to New Zealand, had engaged in dumping in terms of Article VI. The Panel noted that - in the absence of a domestic price in Finland for custom-built transformers of this kind - the New Zealand authorities had based their determination of normal value on the cost-of-production method foreseen in Article VI:1(b)(ii). The Panel also noted that Finland, while not objecting to the use of this method as such, had contested the individual elements of the calculation as being too high, resulting in a constructed price much higher than the actual price of the Finnish exporter. In the Finnish view, the New Zealand authorities should have instead used the cost elements provided by the exporter. The Panel, having heard the arguments put forward by both sides and having perused the documents submitted, concluded that the Finnish exporter, whether through its own fault or not, had not provided all of the necessary cost elements which would have enabled the New Zealand authorities to carry out a meaningful cost-of-production calculation on the basis of the information supplied by the exporter alone. This was true especially for the 4.5 MVA transformer but also to a large degree for the 12.5 MVA unit. In the view of the Panel, the New Zealand authorities were therefore justified in making a cost calculation, where necessary, on the basis of price elements obtained from other sources.

4.3 The Panel then considered the evidence put forward by both sides as to the appropriateness of the cost elements used by the New Zealand authorities in arriving at their decision that dumping had occurred. The Panel noted that this evidence was of a highly technical nature, especially because it related to complicated custom-built products. It also noted that Article VI did not contain any specific guidelines for the calculation of cost-of-production and considered that the method used in this particular case appeared to be a reasonable one. In view of this and having noted the arguments put forward by both sides as regards the costing of certain inputs used in the manufacture of the transformers, the Panel considered that there was no basis on which to disagree with the New Zealand authorities' finding of dumping and proceeded to the question of whether the imports in question had caused or threatened to cause injury to the New Zealand transformer industry.

4.4 The Panel noted the view expressed by the New Zealand delegation that the determination of material injury was a matter specifically and expressly reserved, under the terms of Article VI:6 (a), for the decision of the contracting party levying the anti-dumping duty. It also noted the contention that other contracting parties might inquire as to whether such a determination had been made, but that the latter could not be challenged or scrutinized by other contracting parties nor indeed by the CONTRACTING PARTIES themselves. The Panel agreed that the responsibility to make a determination of material injury caused by dumped imports rested in the first place with the authorities of the importing contracting party concerned. However, the Panel could not share the view that such a determination could not be scrutinized if it were challenged by another contracting party. On the contrary, the Panel believed that if a contracting party affected by the determination could make a case that the importation could not in itself have the effect of causing material injury to the industry in question, that contracting party was entitled, under the relevant GATT provisions, in particular Article XXIII, that its representations be given sympathetic consideration and that eventually, if no satisfactory adjustment was effected, it might refer the matter to the CONTRACTING PARTIES, as had been done by Finland

in the present case. To conclude otherwise would give governments complete freedom and unrestricted discretion in deciding anti-dumping cases without any possibility to review the action taken in the GATT. This would lead to an unacceptable situation under the aspect of law and order in international trade relations as governed by the GATT. The Panel in this connection noted that a similar point had been raised, and rejected, in the report of the Panel on Complaints relating to Swedish anti-dumping duties (BISD 3S/81). The Panel fully shared the view expressed by that panel when it stated that "it was clear from the wording of Article VI that no anti-dumping duties should be levied until certain facts had been established. As this represented an obligation on the part of the contracting party imposing such duties, it would be reasonable to expect that that contracting party should establish the existence of these facts when its action is challenged" (paragraph 15).

4.5 The Panel accepted the argument put forward by New Zealand that the complaining company represented the New Zealand transformer industry in terms of Article VI of the GATT since its output accounted for 92 per cent of the total domestic production. It found support for this view in the report of the Group of Experts on Anti-Dumping and Countervailing Duties BISD 8S/145, paragraph 18) which had discussed the term "industry" in relation to the concept of injury and had concluded that as a general guiding principle, "judgements of material injury should be related to total national output of the like commodity concerned or a significant part thereof". In this connection, the Group of Experts did refer to a single firm that was an important or significant part of the industry.

4.6 In its examination whether the New Zealand transformer industry had suffered injury from the imports in question, the Panel subsequently dealt with the argument put forward by New Zealand that this industry was structured in such a way that there existed four distinguishable ranges of transformers, i.e. transformers between 1-5 MVA, 5-10 MVA, 10-20 MVA, and 20 MVA and above, which for purposes of injury determination had to be considered separately. The Panel was of the view that this was not a valid argument, especially in light of the fact that the complaining company, representing - as indicated above - the New Zealand transformer industry, in the year 1982/83 produced the whole range of transformers, most of which in a range (i.e. above 20 MVA) which was not at all affected by the imports from Finland. In its own submission to the Panel, the New Zealand delegation conceded that the segmentation according to MVA ratings might not coincide with that in other countries and underlined that each segment of the industry's operation made a contribution to the overall viability and profitability of a producer of transformers. It was thus, in the Panel's view, the overall state of health of the New Zealand transformer industry which must provide the basis for a judgement whether injury was caused by dumped imports. To decide otherwise would allow the possibility to grant relief through anti-dumping duties to individual lines of production of a particular industry or company - a notion which would clearly be at variance with the concept of industry in Article VI in a case like the present one where both the Finnish exporter and the New Zealand industry were engaged in the manufacture of distribution and power transformers.

4.7 In its examination, the Panel then turned to the question whether the New Zealand transformer industry had suffered material injury as a result of the imports of the two transformers from Finland. The Panel, did not question that this industry had been in a poor economic situation, due to lack of new orders, diminishing orders on hand in certain product categories, declining profitability, a large increase in imports and considerable uncertainty as to new orders. The Panel noted, on the other hand, that the Finnish imports in question of about \$NZ 175,000 (C & F NZ Port) represented only 2.4 per cent of total sales of the New Zealand transformer industry in 1983. In terms of MVA ratings, the data submitted to the Panel indicated that in the year 1982/83, total New Zealand production and imports taken together represented 1,130 MVA, of which 700 MVA were imported transformers; these figures should be compared with the 17 MVA of the two Finnish transformers taken together. The latter thus represented 1.5 per cent of the sum of domestic production and imports, or 2.4 per cent of total imports. The Panel also considered it significant that imports increased from 1981/82 to 1982/83 by 250 per cent in MVA terms, i.e. from 200 MVA to 700 MVA, and that the imports from Finland

represented only 3.4 per cent of this increase. In view of these facts, the Panel concluded that while the New Zealand transformer industry might have suffered injury from increased imports, the cause of this injury could not be attributed to the imports in question from Finland, which constituted an almost insignificant part in the overall sales of transformers in the period concerned. In this connection, the Panel rejected the contention advanced by the New Zealand delegation that, at least as far as material injury in terms of Article VI was concerned, "any given amount of profit lost" by the complaining firm was in some sense an "injury" to a domestic industry.

4.8 The Panel noted that while the decision of the New Zealand Minister of Customs to impose anti-dumping duties was based solely on material injury having been caused by the imports in question, the New Zealand delegation had also alleged before the Panel the existence of threat of material injury. In view of the high import penetration of the New Zealand transformer market, the significant increase in imports from all sources over one single year and the minimal impact of the actual Finnish imports in question, the Panel saw no reason to assume that imports from Finland would in the future change this picture significantly. The Panel noted in addition that at the time the ministerial decision was taken, the Finnish exporter had not attempted to make any further sales to the New Zealand market. The Panel could therefore not agree that the imposition of anti-dumping duties could have been based on threat of material injury in terms of Article VI.

4.9 In view of the reasons contained in the preceding paragraphs, the Panel came to the conclusion that New Zealand had not been able to demonstrate that any injury suffered by its transformer industry had been material injury caused by the imports from Finland. The Panel therefore found that the imposition of anti-dumping duties on these imports was not consistent with the provision of Article VI:6(a) of the General Agreement.

4.10 In accordance with established GATT practice, the Panel held that where a measure had been taken which was judged to be inconsistent with the provisions of the General Agreement, this measure would prima facie constitute a case of nullification or impairment of benefits which other contracting parties were entitled to expect under the General Agreement.

4.11 The Panel proposes to the Council that it addresses to New Zealand a recommendation to revoke the anti-dumping determination and to reimburse the anti-dumping duty paid.